

# U.S. Customs Service

## *Proposed Rulemakings*

19 CFR Parts 24 and 101

RIN 1515-AC77

### REIMBURSABLE CUSTOMS SERVICES: INCREASE IN HOURLY PERCENTAGE RATE OF CHARGE

AGENCY: Customs Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to increase the hourly percentage rate of charge for reimbursable Customs services. In a previous document published in the Federal Register on February 1, 2001, Customs had proposed increasing the rate of charge to 158 percent of the hourly rate of regular pay of the employee performing the service because the present rate of charge of 137 percent does not reimburse Customs for the actual costs of providing such services. Based on the comments received to the previous Notice and following a complete review of the costs of providing reimbursable Customs services, Customs is now proposing a new methodology for determining the rate of charge for reimbursable Customs services and to revise the rate of charge to 154 percent of the hourly rate of regular pay of the employee performing the service. The proposed increase in the hourly percentage rate of charge is based on the actual expenses incurred by Customs in fiscal year 2000 associated with providing reimbursable Customs services during regular hours of duty and includes an increased percentage rate of charge for administrative overhead costs associated with providing such reimbursable services. This document proposes that the new hourly percentage rate of charge will be reviewed biennially using the actual costs and expenses associated with providing requested reimbursable Customs services from the preceding fiscal year.

Further, this document proposes to increase the percentage rate of charge for administrative overhead costs associated with providing overtime services. It also updates the list of national holidays in 19 CFR 101.6.

DATES: Comments must be received on or before December 9, 2002.

**ADDRESSES:** Written comments may be addressed to, and inspected at, U.S. Customs Service, Office of Regulations and Rulings—Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Written comments may be inspected at U.S. Customs Service, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

**FOR FURTHER INFORMATION CONTACT:** Dennis Lomax, Revenue Branch, National Finance Center, Indianapolis, IN 46278; telephone (317) 298-1200, ext. 1404.

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

Under certain circumstances, Customs provides inspectional and supervisory services to parties-in-interest who request such Customs services during regular hours of duty or on an overtime basis. When these Customs services are provided, however, the party-in-interest is required to reimburse the Government for the Customs employee's compensation and other chargeable expenses. Customs authority to charge these expenses is contained at 31 U.S.C. 9701, which provides, in part, that each government service provided to identifiable persons is to be as self-sustaining as possible and that the fees and charges established by the agency are to be based on the costs to the Government in providing the service.

The amount of compensation and expenses chargeable to parties-in-interest for reimbursable Customs services performed during regular hours of duty is presently based on a computational formula that yields an hourly percentage rate of charge that is provided for in the introductory text of § 24.17(d) of the Customs Regulations (19 CFR 24.17(d)), plus a reimbursable charge for Medicare compensation that is provided for at § 24.17(f), and a reimbursable charge for administrative overhead costs that is provided for at § 24.21. The rate of charge for reimbursable Customs services performed on an overtime or outside the basic 40-hour workweek basis is provided for at other sections in part 24 of the Customs Regulations (see 19 CFR 24.16 and 24.17(d)(1)).

The charge currently provided for the reimbursable services of a Customs employee performed on a regular workday during a basic 40-hour workweek, pursuant to § 24.17(d), is computed at a rate that is equal to 137 percent of the hourly rate of regular pay of the particular employee (plus additional charges for any night pay differential). This charge is based on a five-factor formula that computes an hourly percentage rate of charge that is intended to recover the estimated costs of various employee benefits such as leave, holidays, retirement, and life and health insurance and is only used to determine the costs of providing reimbursable Customs services during a basic 40-hour workweek.

In addition to the base 137 percent rate of charge for reimbursable Customs services performed during a basic 40-hour workweek, § 24.21

provides that 15 percent of the compensation and/or expenses of the Customs employee performing the reimbursable service is chargeable to parties-in-interest for administrative overhead costs. This 15 percent rate of charge for administrative overhead costs has been in effect for nearly 20 years.

In addition to the base 137 percent rate of charge set forth in § 24.17(d) and the 15 percent rate of charge set forth in § 24.21, § 24.17(f) further provides that parties-in-interest are also required to reimburse Customs for its share of Medicare costs for the employee. Section 24.17(f) currently provides that 1.35 percent of the reimbursable compensation expenses incurred will be the payment for Medicare costs. However, the regulations are incorrect because, pursuant to 26 U.S.C. 3111(b), Medicare compensation costs are to be recovered at a rate of charge that is equal to 1.45 percent of the reimbursable compensation expenses incurred.

On February 1, 2001, Customs published a Notice of Proposed Rulemaking (Notice) in the Federal Register (66 FR 8554) that proposed to increase the hourly percentage rate of charge for reimbursable Customs services. The proposed increase was based on a recommendation by Treasury's Office of Inspector General (OIG) following an audit of Customs charges to the courier hubs for reimbursable Customs services that found that the current 137 percent rate of charge computed was inadequate to cover Customs actual costs. The OIG noted that the formula used to determine the computational charge of 137 percent set forth in § 24.17(d) contained two outdated cost factors. First, the formula took account of 9 legal public holidays, but the number of public holidays is now 10 with the addition in 1983 of the Birthday of Martin Luther King, Jr. Second, the formula provided that the working hour equivalent of the Government's contributions for an employee's benefits was computed at 11½ percent of the annual rate of pay of an employee, but that should have risen to 28.55 percent since it was last computed. Accordingly, the OIG recommended that the rate of charge for reimbursable Customs services performed during regular hours of duty should be increased from 137 percent to 158 percent of the hourly rate of regular pay of the employee performing the service. The initial Notice only discussed the increase in the hourly rate of charge percentage for reimbursable Customs services within the context of § 24.17; there was no discussion regarding the additional percentage rate of charge for administrative overhead costs provided for at § 24.21(a).

Comments were solicited on this proposed rulemaking from interested parties with a response date of April 2, 2001. Five comments were timely received: three were from trade associations and two were from express consignment operators. All of the comments expressed general concern about the added increase in costs if the proposed increase in the hourly percentage rate of charge is adopted. Based on these comments, a review of the estimated costs of providing reimbursable Customs services during a basic 40-hour workweek was undertaken.

The comments and the results of Customs review of the computational formula and the additional charges for administrative overhead and Medicare costs associated with providing reimbursable Customs services during a basic 40-hour workweek are addressed below.

#### DISCUSSION OF COMMENTS

##### *Annual & Sick Leave*

##### *Comment:*

Three of the commenters objected to some of the number values attached to factors in the computational formula used to determine the rate of charge for reimbursable Customs services. Two of these commenters objected to the OIG using the maximum time frame for annual leave (26 days, which is the 208 hour figure in the present formula), which is based on the most senior Customs officers, and for sick leave (13 days, which is the 104 hour figure in the formula) as factors in the computational formula used to determine the rate of charge. These commenters felt that the number values attached to these factors had the effect of overstating costs because not all Customs services provided are performed by Customs employees eligible for maximum leave time, which requires 15 years of Government service, and that there was a strong probability that most Customs officers do not use all of their eligible sick leave in a year. These commenters argue that because the number of annual leave and sick days used in the reimbursable computational formula are inappropriate, the calculations are too high and the number values for these factors must be reduced to fairly reflect Custom's costs.

A third commenter stated that if the numbers utilized for annual and sick leave were 50 percent of those being proposed, the computational formula would more accurately reflect the actual figures for work and non-work time, and thus provide a more accurate invoice for reimbursable charges. Noting that express carriers are responsible for reimbursement of Customs fees at double the normal rate of charge, it was stated that when benefits and administrative fees are added and then doubled the actual cost to an express operator for each \$1.00 of salary cost is \$3.04 under the current provisions and would be increased to \$3.46 under the proposed rule. This commenter states that this 13.8 percent increase is significant and creates a real economic burden; however, if the numbers utilized for annual and sick leave were reduced by 50 percent the impact on express operators would be reduced from a 13.8 percent increase to only 5.3 percent, a far more realistic and acceptable increase.

These commenters urged Customs not to adopt the proposed rule; to completely review the Notice regarding the issues raised; and expressed a strong preference for eliminating entirely the current system under which reimbursable charges are assessed, preferring a system that is transparent and simple. Specifically, these commenters advocated a system funded on a transaction-based fee, *i.e.*, a fixed fee per informal shipment.

*Customs response:*

Customs agrees that the present computational formula factors—and resulting hourly percentage rate of charge—do not represent the actual costs to Customs of providing requested inspectional and supervisory services and that a better system, one that is more transparent and simple for reimbursing the Government, should be adopted. To that end, Customs reexamined how reimbursable service charges were calculated and conducted a cost analysis. As a result of the cost analysis, Customs found that it slightly undercharges for the actual costs and expenses of providing requested reimbursable Customs services. Accordingly, Customs is proposing, in this document, a new hourly percentage rate of charge for reimbursable Customs services that is based on actual expenses.

Customs now addresses the comment regarding express carriers being responsible for reimbursement of Customs fees at double the normal hourly rate of charge and that if the numbers utilized for annual and sick leave were reduced by 50 percent of those being proposed the computational formula would more accurately reflect the actual figures for work and non-work time, providing a more accurate invoice for reimbursable charges. Customs does not agree with this comment. First, Customs does not charge for non-work time (see discussion below under Lunch Hours). Second, “the reimbursement of Customs fees at double the normal rate” issue is misleading because the fees billed are statutory. See 19 U.S.C. 58c(b)(9)(A), which provides for the aggregation of merchandise processing fees in an amount equal to reimbursable services. When merchandise is informally entered or released at a centralized hub facility, an express consignment carrier facility, or a small airport or other facility, the Merchandise Processing Fees (MPF) are billed in an amount equal to the reimbursable fee amount. Thus, each Customs assignment at these locations generates two billings, each for identical amounts. One of the billings is to reimburse Customs for providing Customs services (see 31 U.S.C. 9701 and 19 CFR 24.17, which provides for the reimbursable charge fee); the second billing is for MPFs (see 19 U.S.C. 58c(b)(9)(A)(ii) and 19 CFR 24.23(b)(2)(ii), which provide for the MPF when processing merchandise that is informally entered or released.) The generation of a second billing for MPFs that is equal to the amount of the billing for Customs services is in lieu of the per entry or release fee of \$2.00, \$6.00, or \$9.00, provided for at 19 U.S.C. 58c(a)(10) and 19 CFR 24.23(b)(2)(i). This method of billing for the MPF releases the inspectors at the express consignment facilities from the responsibility of having to prepare collection documents for each informal entry which would dramatically slow the process of clearing merchandise and put the express consignment operators in jeopardy of not meeting their delivery deadlines. Accordingly, the billing for the MPF at a cost equal to the billing for Customs services is beneficial to express consignment operators.

Further, any increase in the hourly rate of charge percentage must represent reimbursement to the Government for actual expenses. Accordingly, Customs cannot adopt an artificial number, *i.e.*, 50 percent of the number of annual and sick leave hours used to calculate the reimbursable fee, that bears no relationship to those expenses.

It is also noted that the impact of the proposed increase in the hourly rate of charge percentage contained in this document (discussed below) is less than 1 percent of what is currently billed.

Regarding the comment proposing a system funded on a transaction-based fee, *i.e.*, a fixed fee per informal shipment, Customs points out it is bound by current law which is premised on a reimbursable payment scheme. In order to adopt a transaction fee approach, Congressional action is required. Customs does not have authority, on its own, to adopt a transaction fee system.

Customs agrees that the current system is not transparent and simple. While there is a computational formula set forth in the introductory paragraph of § 24.17(d) for determining reimbursable charges for Customs services, the actual billing practice to collect the fees for Customs services provided entails billing for costs and expenses that are not included in the formula, but are found in various sections of the Customs Regulations: §§ 24.16, 24.17 (other than the introductory paragraph of paragraph (d)), and 24.21. To remedy this situation, Customs is proposing in this document a new formula basis that would consolidate various regulatory provisions for clarity and be more accurate in providing reimbursement to Customs for the actual costs and expenses associated with providing requested Customs services.

#### *Lunch Hours*

##### *Comment:*

Two commenters objected that the OIG Report provided that couriers could be invoiced for employee's time spent at lunch. These commenters stated that no such allowance should be allowed and that reimbursable charges should be assessed only for actual time worked.

##### *Customs response:*

Regarding billings for the actual hours worked by Customs personnel, the OIG Report stated that Customs only billed 7 hours a day when inspectors worked a full 8 hours. This means that Customs did not bill couriers for employee's time spent at lunch.

#### *Benefits Ratio*

##### *Comment:*

Two commenters stated that the OIG Report provided no substantiation for the ratio of benefit costs to employee's salary. One of these commenters alleged that because the initial Federal Register Notice did not explain the OIG's audit report's conclusion—that the benefit ratio is 28.55 percent instead of 11.5 percent—that it violates the Administrative Procedure Act and Customs should withdraw the Notice.

*Customs response:*

Customs disagrees that the initial Notice violated the Administrative Procedure Act (APA). In promulgating a rulemaking document for publication in the Federal Register one of the requirements is that the Notice of Proposed Rulemaking shall include either the terms or substance of the proposed rule or a description of the subjects and issues involved. See 5 U.S.C. 553(b)(3). Customs believes the initial Notice clearly stated that the proposal was to increase the rate of charge for reimbursable Customs services in accordance with the OIG Report and that this met the APA standard of a description of the subjects and issues involved. Nonetheless, Customs believes that this comment is moot as Customs is proceeding in this document with another proposal.

*Revenue Raising**Comment:*

One commenter stated that the OIG Report suggests that the underlying purpose of the proposed 15 percent increase in the computational charge is not to reimburse Customs for costs of services, but rather, to raise revenue, which is an unlawful purpose.

*Customs response:*

Customs disagrees with this interpretation of the OIG's Report statement. The OIG Report statement in question was presented as a net result, that is, that if Customs increased its hourly rate of charge percentage from 137 percent to 158 percent, this would result in a revenue enhancement to Customs in that it would enable Customs to collect all the revenue due for providing reimbursable Customs services.

*Computation of charges**Comment:*

One commenter stated that the proposed increase in the rate of charge was unreasonable and arbitrary, and would have a significant financial impact on all airports, not just user-fee airports. This commenter proposed that a more reasonable increase of 149 percent, one that is in line with similar services provided airports, be adopted.

*Customs response:*

Customs has already discussed how the proposed increase in the hourly rate of charge percentage merely represents reimbursement to the Government based on actual expenses. Since the proposed increase in the hourly rate of charge percentage bore a direct relationship to actual expenses, as audited by the OIG, the proposal was neither unreasonable nor arbitrary. However, as indicated later in this document, Customs is now proposing a different rate of charge based on actual expenses during the fiscal year of 2000.

*Application of charges**Comment:*

Three of the commenters argued that the reimbursable charges imposed by Customs on the air express industry are not similarly imposed

on the U.S. Postal Service (USPS), which gives USPS an unfair competitive advantage. These commenters recommended that Customs rectify this imbalance before attempting to increase the rate of charge for reimbursable Customs services.

*Customs response:*

It is acknowledged that the billing schemes applicable to the USPS and the air express industry are statutorily different: one being grounded in the Consolidated Omnibus Budget Reconciliation Act of 1985, the other being grounded in the Omnibus Budget Reconciliation Act of 1987. But since the initial Notice concerned an increase in the rate of charge for reimbursable Customs services and not the application of this rate of charge, this comment falls outside the scope of this rulemaking and will not be addressed in this document.

*Impact of increase and need for delayed effective date for final rule*

*Comment:*

One commenter urged Customs to delay the effective date of any new reimbursable rate six months from the date of publication. The commenter stated that delaying the effective date would provide a reasonable amount of time for businesses whose budgets are already established based on the existing rate of charge for reimbursable Customs services to adjust to the proposed increased rate of charge.

*Customs response:*

Customs cannot agree to this accommodation for several reasons. First, the proposed increase in the rate of charge is minimal. The present total charge for reimbursable Customs services is 153.45 percent and the proposed increase, as discussed below, will only raise the total charge to 154 percent. Customs does not believe that such a small increase would cause serious disruption to interested parties' budgets. Second, in consolidating the various regulatory provisions that comprise the total charge for reimbursable Customs services, Customs is making its regulations as transparent and simple as possible—a goal that should be accomplished as soon as possible. Third, the purpose for the change in the rate of charge for reimbursable Customs services is to provide full reimbursement to Customs for these services. For these reasons, allowing for a delayed effective date of six months would contradict the purpose of the reimbursable charges statute (31 U.S.C. 9701). Accordingly, in the final rule document Customs expects to provide for the normal 30 days delayed effective date provided for by the APA.

FURTHER CONSIDERATION BY CUSTOMS

Based upon the comments received to the initial Notice published on February 1, 2001, and upon further consideration of the factors employed in the computational formula to represent reimbursement to Customs for the costs and expenses associated with providing requested Customs services, Customs has decided to no longer use the five-factor computational formula that is presently used to determine the hourly



percentage rate of charge for reimbursable Customs services. The computational formula currently provided at § 24.17(d) contains outdated cost factors and other factors that do not capture the actual costs to Customs of providing inspectional and supervisory services. Customs now believes that a straight comparison of actual costs based on data every other year—beginning with fiscal year 2000—yields an hourly percentage rate of charge that provides Customs with a firm basis for determining the fees it needs to charge for reimbursable Customs services. Further, Customs believes that consolidating the various regulatory provisions that comprise all the costs and expense factors used to charge parties-in-interest for requested Customs services will provide the trade community with the clarity it needs to understand how Customs arrives at the percentage rate charged.

*New Proposed Rate of Charge*

This document sets forth a new proposed methodology for determining the rate of charge for reimbursable Customs services performed on a regular workday during a basic 40-hour workweek, and, based on that methodology, proposes that the rate of charge be increased to a single rate of 154 percent of the hourly rate of regular pay of the employee performing the service. This new proposed hourly percentage rate of charge employs an updated computational formula that is based on the ratio of actual benefits to salary for personnel in the Office of Field Operations who performed reimbursable services during regular hours of duty (not costs for overtime or services delivered outside the basic workweek) in fiscal year 2000. The new proposal consolidates in one section of the regulations (§ 24.17(d)) the other fee and expense provisions associated with providing reimbursable Customs services during regular hours of duty.

For the Office of Field Operations for fiscal year 2000, the ratio of benefits to salary was determined as follows:

<i>Salaries</i>	
Full-time	\$479.1 M
Part-time	6.5 M
Total Salaries	\$485.6 M
<i>Benefits</i>	
Life and Health Insurance	\$ 31.6 M
Retirement Contributions	55.5 M
FICA	18.1 M
Medicare	3.6 M
Uniforms	3.8 M
Cost of Living	2.9 M
All Others	3.6 M
Total Benefits	\$ 119.1 M
Benefits Rate of Charge = 24 percent (119.1 M/485.6 M)	

Thus, the benefits rate of charge is calculated to be 24 percent. In determining this benefits ratio, Medicare costs are included. Medicare costs are not considered within the 137 percent rate of charge currently

set forth in the regulations at § 24.17(d); they are added on to the 137 percent pursuant to § 24.17(f).

Because the Medicare compensation cost is directly factored into the proposed percentage rate of charge, it is proposed to revise paragraph (f) of § 24.17 to limit its application to provisions other than the provision providing for reimbursable Customs services during a regular workweek. Also, the reference to 1.35 percent is removed, as the rate was changed to 1.45 percent in 1986 by the Federal Insurance Contributions Act (FICA), which establishes this compensation charge.

Currently, in addition to the charge of 137 percent and the Medicare charge, Customs charges for administrative overhead for services performed during the regular workweek. Administrative overhead is provided for at § 24.21 of the Customs Regulations. In this document, Customs is proposing to consolidate the administrative overhead charge for work during a regular workweek into the hourly percentage rate of charge.

*Administrative Overhead Charges for Regular Workweek Reimbursable Services*

Section 24.21(a) provides, in part, that an additional charge for administrative overhead costs must be collected from parties-in-interest who are required to reimburse Customs for compensation and/or expenses of Customs officers performing reimbursable and overtime services for the benefit of such parties under either § 24.16 or § 24.17. This charge is currently represented by the flat rate of charge of 15 percent. The flat rate of charge was adopted in 1984 because at that time Customs did not have a formal accounting system for determining the indirect costs of administrative overhead and chose to adopt the Treasury Department's recommendation that 15 percent of the identified costs of providing such services be used. See T.D. 84-231.

To determine whether the 15 percent administrative overhead charge truly represented reimbursement to the government, Customs took the actual indirect costs of administrative overhead expenses during regular hours of duty (not costs for overtime or services delivered outside the basic workweek) for the Office of Field Operations for fiscal year 2000 and found the following relationship:

*Salaries*

Full-time	\$479.1 M
Part-time	6.5 M
Total Salary	<u>\$485.6 M</u>

*Administrative Support* \$145.1 M

Administrative Overhead Rate of Charge = 30 percent (145.1 M/485.6 M)

Thus, the charge for administrative overhead is determined to be 30 percent of the compensation and/or expenses of the Customs officers performing the services. Combining the direct benefit and the indirect

administrative overhead rates of charge gives a single rate of charge percentage that is calculated as follows:

Benefits Costs	119.1 M
Administrative Overhead Costs	145.1 M
Total Benefit and Administrative Overhead Costs	264.2 M
Combined Rates of Charge = 54 percent (264.2 M/485.6 M)	

Taking these tabulations into consideration, Customs in this document is proposing to amend § 24.17(d) to reflect that the charges for the services of a Customs employee on a regular workweek during a basic 40-hour workweek will be computed at 154 percent of the hourly rate of regular compensation for the particular Customs employee performing the services.

Because the administrative overhead cost is directly factored into the proposed percentage rate of charge for work during a regular workweek, Customs is proposing to amend § 24.21(a) to remove the references to reimbursable services and § 24.17.

*Administrative Overhead Charges for Overtime Reimbursable Services*

Customs also examined the relationship between administrative overhead expenses for overtime services and the compensation and/or expenses of the Customs officers performing overtime services. Customs took the actual indirect costs of administrative overhead expenses associated with providing Customs services on an overtime basis for the Office of Field Operations for fiscal year 2000 and found the following relationship:

Overtime Salaries	132.1 M
Administrative Support	\$ 39.5 M
Administrative Overhead Rate of Charge = 30 percent (39.5 M/132.1 M)	

This 30 percent rate more accurately reflects the Government's cost in providing administrative overhead services to parties-in-interest. Accordingly, it is proposed to amend § 24.21(a) to reflect that the rate of charge for administrative overhead for Customs officers performing overtime services will be 30 percent of the compensation and/or expenses of the Customs officers performing the service. A conforming change is proposed to § 24.17(e).

With the proposed amendments to part 24 of the Customs Regulations, Customs believes that the calculation of the percentage charges for Customs services provided on either a reimbursable or overtime basis is more transparent and simple to compute.

The proposed new percentage rates of charge set forth in this document more accurately reflects the Government's actual costs in providing these services to parties-in-interest and will be reviewed biennially using the actual costs and expenses associated with providing requested reimbursable Customs services from the preceding fiscal year.

*Other Amendments*

In § 101.6, it is proposed to amend paragraph (a) by updating the list of national holidays on which Customs offices are closed by adding the third Monday in January, and the heading of paragraph (b) by correcting a typographical error.

## COMMENTS

Before adopting these proposed regulations as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.5 of the Treasury Department Regulations (31 CFR 1.5), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 799 9th Street, N.W., Washington, D.C. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

## THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

The proposed amendments are intended to conform the Customs regulations with statutory laws, which provide for ten legal public holidays and allow Customs to assess reimbursable charges to those parties-in-interest who require Customs services on either a reimbursable or overtime basis. Further, in the case of reimbursable charges for Customs services performed during regular hours of duty, because the proposed increases in the percentage rates of charge yield a combined increase that is so small (an increase of only .55 percent), pursuant to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. Further, these proposed amendments do not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

## DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Attorney, Regulations Branch, Office of Regulations and Rulings. However, personnel from other offices participated in its development.

## LIST OF SUBJECTS

## 19 CFR Part 24

Accounting, Customs duties and inspection, Fees, Financial and accounting procedures, Reimbursable charges, Reporting and record-keeping requirements, Wages.

## 19 CFR Part 101

Customs duties and inspection, Organization and functions (Government agencies), Reimbursable charges, Reporting and recordkeeping requirements, Wages.

## PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons set forth above, it is proposed to amend parts 24 and 101 of the Customs Regulations (19 CFR parts 24 and 101), as set forth below:

## PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation for part 24 continues to read, and the specific authority for § 24.17 is revised to read, as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1505, 1624; 26 U.S.C. 4461; 4462; 31 U.S.C. 9701.

\* \* \* \* \*

Section 24.17 also issued under 5 U.S.C. 6103; 19 U.S.C. 267, 1450, 1451, 1452, 1456, 1524, 1557, 1562; 46 U.S.C. 2110, 2111, 2112;

\* \* \* \* \*

2. In § 24.17:

- a. the introductory text of paragraph (d) is revised and the table following the introductory text is removed;
- b. paragraph (e) is revised; and
- c. paragraph (f) is revised.

The revisions to paragraphs (d), (e), and (f) read as follows:

**§ 24.17 Reimbursable services of Customs employees.**

\* \* \* \* \*

(d) *Computation charge for reimbursable services.* The charge for the services of a Customs employee on a regular workday during a basic 40-hour workweek is computed at a rate that is equal to 154 percent of the hourly rate of regular compensation for the particular Customs employee performing the services with an additional charge equal to any night pay differential actually payable under 5 U.S.C. 5545. The 154 percent hourly rate of charge is based on the reimbursable service expenses incurred by the Office of Field Operations during fiscal year 2000 and includes charges for administrative overhead and Medicare.

\* \* \* \* \*

(e) The reimbursable charge for Customs services performed on an overtime basis shall be computed in accordance with §§ 24.16 and 24.21(a).

(f) *Medicare compensation costs.* In addition to other expenses and compensation chargeable to parties-in-interest set forth in this section, unless otherwise expressly provided for, such persons shall also be required to reimburse Customs for its share of applicable Medicare costs.

3. In § 24.21, the heading and paragraph (a) are revised to read as follows:

**§ 24.21 Administrative overhead charges.**

(a) *Overtime services.* The charge for the administrative overhead costs associated with providing Customs services on an overtime basis for parties-in-interest under the provisions of § 24.16 of this part shall be computed at a rate that is equal to 30 percent of the hourly rate of compensation for the particular Customs employee performing the service.

\* \* \* \* \*

**PART 101—GENERAL PROVISIONS**

1. The general authority citation for part 101 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 6103; 19 U.S.C. 2, 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

\* \* \* \* \*

2. In § 101.6:

a. paragraph (a) is revised; and

b. paragraph (b) is amended by removing the word “hgurs” in the heading and adding, in its place, the word “hours”.

The revision reads as follows:

**§ 101.6 Hours of business.**

\* \* \* \* \*

(a) *Saturdays, Sundays, and national holidays.*—(1) *National holidays.* In addition to Saturdays, Sundays, and any other calendar day designated as a holiday by Federal statute or Executive Order, Customs offices will be closed on the following national holidays:

- (i) January 1;
- (ii) The third Monday in January;
- (iii) The third Monday in February;
- (iv) The last Monday in May;
- (v) July 4;
- (vi) The first Monday in September;
- (vii) The second Monday in October;
- (viii) November 11;
- (ix) The fourth Thursday in November; and
- (x) December 25.

(2) *Observance of national holidays.* If a national holiday falls on a Saturday, then the Friday preceding that Saturday will be observed as the national holiday for work purposes. If a national holiday falls on a

Sunday, then the Monday following that Sunday will be observed as the national holiday for work purposes.

\* \* \* \* \*

ROBERT C. BONNER,  
*Commissioner of Customs.*

Approved: October 2, 2002.

TIMOTHY E. SKUD,

*Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, October 9, 2002 (67 FR 62920)]

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## 19 CFR Part 111

RIN 1515-AD14

### PERFORMANCE OF CUSTOMS BUSINESS BY PARENT AND SUBSIDIARY CORPORATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document sets forth proposed amendments to Part 111 of the Customs Regulations to specify that corporate compliance activity engaged in for the purpose of exercising “reasonable care” under 19 U.S.C. 1484 is not customs business and, therefore, such activity is not subject to the customs broker licensing requirements of 19 U.S.C. 1641. The proposed amendments make clear that this corporate compliance activity concept does not extend to document preparation and filing, which is customs business subject to licensing requirements. It is anticipated that the proposed amendments will improve the operational efficiency of the affected corporate entities and, thereby, enhance their ability to ensure compliance with applicable customs laws and regulations.

DATES: Comments must be submitted on or before December 16, 2002.

ADDRESSES: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9<sup>th</sup> Street N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Gina Grier, Office of Regulations and Rulings (202-572-8730).

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

##### *Statutory and regulatory framework*

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that a person must hold a valid customs broker’s license and

permit in order to transact customs business on behalf of others, sets forth standards for the issuance of broker's licenses and permits, provides for disciplinary action against brokers in the form of suspension or revocation of such licenses and permits or assessment of monetary penalties, and provides for the assessment of monetary penalties against other persons for conducting customs business without the required broker's license. Section 641 also authorizes the Secretary of the Treasury to prescribe rules and regulations relating to the customs business of brokers as may be necessary to protect importers and the revenue of the United States and to carry out the provisions of section 641.

The regulations issued under the authority of section 641 are set forth in Part 111 of the Customs Regulations (19 CFR Part 111). Part 111 includes detailed rules regarding the licensing of, and granting of permits to, persons desiring to transact customs business as customs brokers, including the qualifications required of applicants and the procedures for applying for licenses and permits. Part 111 also prescribes record-keeping and other duties and responsibilities of brokers, sets forth in detail the grounds and procedures for the revocation or suspension of broker licenses and permits and for the assessment of monetary penalties, and sets forth fee payment requirements applicable to brokers under section 641 and 19 U.S.C. 58c(a)(7).

Section 111.1 of the Customs Regulations (19 CFR 111.1) defines "customs business" as follows for purposes of Part 111:

"Customs business" means those activities involving transactions with Customs concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by Customs on merchandise by reason of its importation, and the refund, rebate, or drawback of those duties, taxes, or other charges. "Customs business" also includes the preparation, and activities relating to the preparation, of documents in any format and the electronic transmission of documents and parts of documents intended to be filed with Customs in furtherance of any other customs business activity, whether or not signed or filed by the preparer. However, "customs business" does not include the mere electronic transmission of data received for transmission to Customs.

Section 111.1 also defines "person" for purposes of Part 111 as including "individuals, partnerships, associations, and corporations."

Section 111.2 of the Customs Regulations (19 CFR 111.2) sets forth the basic rules regarding when a person must obtain a customs broker license and permit. Paragraph (a)(2) of § 111.2 specifies several exceptions to the license requirement including, in subparagraph (i), an exception for an importer or exporter (and his authorized regular employees or officers acting only for him) transacting customs business solely on his own account and in no sense on behalf of another. Section 111.4 of the Customs Regulations (19 CFR 111.4) provides that any person who intentionally transacts customs business, other than as provided in § 111.2(a)(2), without holding a valid broker's license, will be



liable for a monetary penalty for each such transaction as well as for each violation of any other provision of section 641.

*Reasons for proposed change*

The amendments made in 1993 by the Customs Modernization Act provisions of the North American Free Trade Agreement Implementation Act (Public Law 103-182, 107 Stat. 2057) included the requirement to exercise “reasonable care” in connection with the entry requirements set forth in 19 U.S.C. 1484. To foster compliance with the customs laws and regulations under this added statutory responsibility, many importer groups consisting of a parent corporation and one or more subsidiary corporations have chosen to centralize their in-house customs experts into one corporate entity and to make the services of those experts available to the group as a whole. However, when requested to issue an administrative ruling on the issue, Customs has consistently taken the position that many of the activities performed under this type of arrangement would involve the transaction of “customs business,” which would require a broker license under § 111.2(a)(1). *See* HQ 115248 dated August 26, 2001, and HQ 115278 dated November 13, 2001. In this regard, Customs has considered the fact that (1) the parent corporation and each subsidiary corporation is a separate legal “person” both under longstanding legal precedent and under the definition of “person” in § 111.1, and (2) therefore, the parent or subsidiary corporation in which the customs expertise resides would be transacting customs business not solely on its own account as provided under § 111.2(a)(2)(i) but rather on behalf of another “person.”

Members of the trade community have indicated to Customs that the present situation is unsatisfactory because it does not afford importers sufficient opportunity to address multiple related aspects of an individual customs transaction or groups of transactions and thus is an impediment to their ensuring that reasonable care is exercised by all corporate affiliates for purposes of 19 U.S.C. 1484.

An example will illustrate the basis for the trade community concerns: Under the current regulations as interpreted by Customs, if an unlicensed corporation in a parent and subsidiary relationship wished to engage a licensed individual broker as an employee of the corporation to give customs business advice to its related company regarding specific transactions, there would be certain legal limitations. The rendering of advice under the described circumstances would be permissible only if the licensed broker employee were to become a *bona fide* employee of each of the two involved companies, or if the employing corporation were to obtain a corporate broker license, or if the licensed broker employee were to set up business to operate as a broker during non-work hours.

Accordingly, Customs is proposing for public comment amendments to the Customs Regulations that would expand the permissible use of in-house experts by corporations and their affiliates to include activity that is intended to meet the corporation’s “reasonable care” obligations

under 19 U.S.C. 1484 and that, as such, does not fall within the definition of “customs business” in 19 U.S.C. 1641. The proposed amendments are discussed below.

#### *Discussion of proposed amendments*

Customs believes that the definition concepts in § 111.1 should be amended to recognize corporate compliance activity as falling under the term reasonable care and, as such, as not falling within the term “customs business.” This would allow parent, subsidiary, and sister subsidiary corporations to structure their corporate compliance activities to ensure an effective and efficient exercise of “reasonable care” under 19 U.S.C. 1484. Accordingly, this document proposes to add a definition of the term “corporate compliance activity” to § 111.1 and to amend the existing definition of “customs business” by adding conforming exception language at the end of the last sentence. Under these proposed amendments, the limitations on the activities described in the previously discussed example would no longer apply because those activities would not be considered “customs business.” Rather, they would be allowed as a corporate compliance activity under the “reasonable care” standard in 19 U.S.C. 1484.

The new definition limits the corporate compliance activity that the in-house experts may perform to those activities that do not involve the preparation of documents or their electronic equivalents to be filed with Customs and the filing of documents or their electronic equivalents with Customs, because Customs believes that these specialized activities clearly fall within the term “customs business.”

Finally, this document proposes to amend § 111.2 by adding a new paragraph (a)(2)(vii) which states that a company performing a corporate compliance activity is not required to be licensed as a broker.

#### COMMENTS

Before adopting the proposed amendments as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Office of Regulations and Rulings, U.S. Customs Service, 799 9<sup>th</sup> Street, N.W., Washington, D.C. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

#### EXECUTIVE ORDER 12866

This document does not meet the criteria for a “significant regulatory action” as specified in E.O. 12866.

## REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Customs believes that the proposed amendments will have only a minimal impact on overall customs broker operations because they do not authorize the preparation of documents and the filing of documents with Customs, which constitute the bulk of customs business services provided by brokers, and the proposed amendments will provide positive economic and related benefits to other members of the import community. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

## DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

## LIST OF SUBJECTS IN 19 CFR PART 111

Administrative practice and procedure, Brokers, Customs duties and inspection, Imports, Licensing, Penalties, Reporting and recordkeeping requirements.

## PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to revise Part 111 of the Customs Regulations (19 CFR Part 111) as set forth below.

## PART 111—CUSTOMS BROKERS

1. The authority citation for Part 111 continues to read in part as follows:

**Authority:** 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1624, 1641;

\* \* \* \* \*

2. In § 111.1, the definition of “customs business” is amended by adding at the end of the last sentence before the period the words “and does not include a corporate compliance activity”, and a new definition of “corporate compliance activity” is added in appropriate alphabetical order to read as follows:

## § 111.1 Definitions.

\* \* \* \* \*

*Corporate compliance activity.* “Corporate compliance activity” means activity performed by a parent company or subsidiary company or sister subsidiary company to ensure that documents for a parent company or subsidiary company or sister subsidiary company are prepared and filed with Customs using “reasonable care”, but such activity does not extend to the actual preparation or filing of the documents or their

electronic equivalents. For purposes of this definition, a parent company is a corporation that owns more than 50 percent of the voting shares of another corporation, a subsidiary company is a corporation in which a parent company owns more than 50 percent of the voting shares, and a sister subsidiary company is one of two or more corporations in which the same parent company owns more than 50 percent of the voting shares.

\* \* \* \* \*

3. In § 111.2, a new paragraph (a)(2)(vii) is added to read as follows:

**§ 111.2 License and district permit required.**

(a) \* \* \*

(2) \* \* \*

(vii) *Corporate compliance activity.* A company performing a corporate compliance activity is not required to be licensed as a broker.

\* \* \* \* \*

DOUGLAS M. BROWNING,  
*Acting Commissioner of Customs.*

Approved: October 8, 2002.

TIMOTHY E. SKUD,

*Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, October 15, 2002 (67 FR 63576)]